IN THE GRAND COURT OF THE CAYMAN ISLANDS

HOLDEN AT GEORGE TOWN, GRAND CAYMAN

CICA NOS. 9 of 1994 and M14 OF 1994

GRAND COURT CAUSE NO. 200 OF 1994

**BEFORE:** **THE RT. HON. MR. JUSTICE EDWARD ZACCA PC., OJ. PRESIDENT**
**THE RT. HON. MR. JUSTICE TELFORD GEORGES PC., JA.**
**THE RT. HON. MR. JUSTICE JAMES KERR, JA.**

In the matter of
The Evidence (Proceedings in Other Jurisdictions) (Cayman Islands) Order 1978

and

In the matter of
A Proceeding commenced by the Democratic Constituent Congress Committee investigating the Contracts for the Electric Train and Mass Transport Projects in Lima and Callao ("CITEL")

| | | |
|---|---|---|
| BETWEEN: | WORLDWIDE FINANCIAL HOLDING | Appellant |
| AND: | CITEL | Respondent |

Mr. Charles Quin of Messrs. Paget-Brown Quin & Hampson for the appellant
Mr. Ramon Alberga Q.C. instructed by Mr. Shawn McCann of Messrs. Bruce Campbell & Co for the respondent

On 30th November 1994, 1st December 1994, 12th December 1994 and 20th April, 1995

On December 12, 1994, we allowed this appeal and promised to put our reasons into writing. This we now do.

On the 13th February, 1989, a contract was entered into between an Italian Consortium and a Peruvian Government Organisation for the Lima Electric Train Project. It is alleged that certain Peruvian officials, including a former President of the Republic of Peru, Mr. Alan Garcia, corruptly received payments of money in relation to the project.

In Peru, an ordinary criminal action is instituted with an accusation filed by the Public Prosecutor before a Judge of the Criminal Court. When charges are laid, the Judge issues a resolution either opening the investigative process or dismissing it. During the investigative stage, the Judge directs the gathering of evidence as well as ascertaining the liability of the accused person or persons. Once the preliminary investigation is over, the Judge and the Public Prosecutor prepare reports which are considered by the Criminal Branch of the Superior Courts which decide whether a public hearing shall commence. Three Judges determine on the guilt or otherwise of the accused person or persons.

Criminal proceedings have been instituted in the Peruvian Courts against certain individuals for allegedly corrupting high ranking state officials in connection with the Lima Electric Train Special Project.

The Constitution of Peru, in Article 99 provides that it falls to the Permanent Commission of the Congress to determine whether criminal charges against High State Officials, including the President or the former President of the Republic, shall proceed to trial before the Supreme Court.

Provision is also made for the Congress to commence investigation into matters of public interest.

Article 97 states:

> " The Congress may commence investigations on any matter of public interest. It has binding force to appear, upon requisition, before the Commissions in charge of such investigations, under the same restraints in force in the judicial procedure.
>
> For the fulfillment of its goals, such Commissions may have access to any kind of information, and this may involve disclosing the bank secret and the tax reserve secret, but such information affecting the personal privacy. The resolutions of said commisions do not bind the jurisdictional bodies."

It appears therefore that Article 97 deals with the investigation of any matter of public interest, whereas Article 99 deals with the Permanent Commission determining whether criminal charges should commence against High Officials including the President of the Republic or a former President.

Article 100 provides:

> " It falls to the Congress, without participation of the Permanent Commission to suspend or not the accused official or disqualify him/her to hold a public post up to for a ten year term, or dismiss him/her from his/her post without prejudice to any other responsibility.
>
> In this process, the accused has the right to self defence and with the assistance of a lawyer before the Permanent Commission and before the Plenary Meeting of the Congress.
>
> In the event of a criminal nature accusation resolution, the Attorney General complaints before the Supreme Court in the five day term. The Criminal Supreme Member opens the corresponding proceeding.
>
> The acquittal of the Supreme Court gives the accused his/her political rights back.
>
> The terms of the Attorney General's complaint as well as of the court decree for opening of the proceeding can neither exceed nor reduce the terms of the Congress charge".

It seems therefore that the accused has the right of self defence with the assistance of a lawyer before the Permanent Commission and before the Plenary Meeting of the Congress.

The Permanent Commission of Congress is therefore authorised to consider accusations against high officials and make their recommendations to the Plenary Meeting of Congress. In the event of a criminal nature resolution, the Attorney General is obliged to prosecute the state official. The Public Prosecutor and the Supreme Court do not have the power to reduce or extend the terms of the Congress charge.

Article 25 of the Regulations of the Democratic Constitutional Congress provides for the Commissions of the Congress.

These are:

(1) Permanent Commissions; and

(2) Temporary Commissions which may be:

(a) Investigation Commissions;

and

(b) Special Commissions.

In addition to the Permanent Controlling Commission, the Plenary Meeting of Congress may appoint investigative Commissions for important matters which, are not handled by the said Permanent Commission. This is provided for in Article 35 of the Regulations which state:

> " Separately from the Permanent Controlling Commission, the plenary meeting may appoint investigative commissions for important matters which, in such case, are not handled by said Permanent Commission. Special investigative commissions are constituted by three to five members of congress. Said commissions are established within the three days following their appointment. They submit their reports to the plenary meeting within the thirty days following their establishment date, unless a longer term is granted.
>
> During their operation, each investigative commission shall keep the Permanent Controlling Commission abreast of their progress. The conclusions approved by the Plenary Meeting neither bind the Judiciary but in the constitutional pre-trial conference, nor affect the ordinary course of the judicial processes, without prejudice that the result of the investigation is communicated to the Office of the Attorney General for the relevant purposes.
>
> Investigative Commission may request appearance of any citizen, under the same constraints in force for judicial proceedings.
>
> Investigative Commissions may request the President of the Congress or its Supervisory Board, hiring of professional services from competent consultants in the subject matter of the investigation."

It is to be noted that unlike the Permanent Commission or the Plenary meeting, no mention is made of the accused's right to self defence with the assistance of a lawyer. This may be so because there is no accused party but the investigation of important matters.

Another difference is that in the case of the Investigative Commission, their conclusions do not bind the Judiciary and the result of the Commission is communicated to the Office of the Attorney General for the relevant purposes.

CITEL is a special Investigative Commission appointed by Congress in accordance with Article 97 of the Constitution and Articles 25 and 35 of the Regulations of the Democratic Constitutional Congress. This is stated in the affidavit of Mr. Andres Reggiardo Sayan on behalf of CITEL. He was appointed President of the Special Investigative Commission.

As observed above, Article 97 empowers the Congress to commence investigations on any matter of public interest. Article 25 of the Regulations provide for Permanent Commissions and Temporary Commissions which may be (a) Investigation Commissions and (b) Special Commissions. Article 35 of the Regulations empowers Congress in its plenary meeting to appoint investigative Commissions for important matters.

On November 12, 1993 the Democratic Constitutional Congress wrote to Congressman Andres Reggiardo Sayan as follows:

> " The Democratic Constitutional Congress in a session held today, upon taking knowledge of the Agenda Motion proposed by Messrs. Fernando Olivera Vega, Ernesto Gamarra Olivares, Humberto Sambureti Pedraglio, Carlos Cuaresma Sanchez and Willy Serrato Puse, requesting the appointment of an investigative commission on the contracts for the Electric Train of Lima, agreed as follows:
>
> The Democratic Constitutional Congress hereby
>
> RESOLVES:
>
> 1. To appoint an Investigative Commission on the Contracts of the Electric Train of Lima, which shall have any and all information, logistic and financial support.
>
> 2. To communicate officially with

the Italian authorities, mainly the Prosecutor of Rome Mr. Vittorio Paraggia as well as the President of the Italian House of Representatives, in order to inform them on the progress of the investigation and request them their co-operation and sharing of information.

3. To communicate officially with the Attorney General's Office so that, working with the Judiciary, it takes the necessary precautionary measures aimed to avoid fleeing of the main involved people; particularly: Alan Garcia Perez (at large); Javier Tantalean Arbulu, Luis Gonzales Posada, Jorge del Castillo Galvez, Antonio Biondi-Bernales, Rolando Sanchez Verdeguer, among others.

In keeping with the above mentioned agreement and upon the proposal of the panel discussion, appointment of the following congressmen to constitute the aforesaid Investigative Commission was agreed:

- Mr. congressman Andres Reggiardo Sayan
- Mr. congressman Alexander Kouri Bumachar
- Mr. congressman Fernando Olivera Vega
- Mr. congressman Victor Melendez Campos and
- Mr. congressman Samuel Matsuda Nishimura.

Upon exemption from the approval formalities of the corresponding records, and enclosing with illustrative purposes a copy of the documents supporting the motion above, I hereby comply with informing you this for the resulting purposes."

The letter is signed by Victor Joy Way Rojas, third Vice President of the Democratic Constitutional Congress.

It is clear from this letter of appointment that an Investigative Commission was appointed to investigate the Contracts of the Electric Train of Lima.

During the CITEL hearings, one Sergio Serafusa testified that Mr. Alan Garcia corruptly solicited money from the Italian Consortium involved in the Electric Train Project. He stated that three payments were made by the Consortium, totalling U.S.$840,000.00 to a certain account with Barclays Bank, Grand Cayman, at the request of Mr. Garcia.

On 22nd June, 1994, an Ex Parte application, on a request contained in Letters Rogatory from the President of the Investigative Commission, investigating the contracts for the Electric Train of Lima, was made to the Grand Court and the learned trial Judge ordered:

1. The Deputy Clerk of the Grand Court be appointed Examiner herein to depose the following persons:-

   (i) Mr Alex Wood, Manager, Barclays Bank Plc Cardinal Avenue (P.O. Box 68), George Town, Grand Cayman, Cayman Islands;

   (ii) Any Director, Shareholder or officer of the Cayman Islands company ["the company"] being the holder of account No. 280762361 - 2952733 at the George Town Branch of Barclays Bank Plc., Grand Cayman, Cayman Islands.

2. The said witnesses be compelled to attend before the Examiner at the Law Courts, George Town, Grand Cayman or such other place as determined by the said Examiner on the 27th day of June, 1994 at 10.00 a.m. and that the said witnesses submit themselves to being examined upon oath or affirmation concerning the testimony required by CITEL pursuant to the Letter of Request dated the 17th June, 1994 and to produce the following documents:

   (i) All documents relating to the receipt of the following sums:-

      (a) US$300,000.00 on or about 11th October, 1989;

      (b) US$300,000.00 on or about 4th January, 1990;

      (c) US$240,000.00 on or about 14th August, 1990;

   credited to Barclays Bank Plc. George Town, Grand Cayman account No. 280762361-2952733, and subsequent disposition thereof.

   (ii) All documents relating to the receipt of any other monies credited to the account since 13th February, 1989, and the subsequent disposition thereof.

(iii) All correspondence (including letters or notes of instructions) ledgers, day books, accounts books, and computer records used in the ordinary course of business relating to the transactions referred to in the proceeding paragraphs.

All corporate records including (but not exclusive of) the Register of Shareholders, Directors and Officers, Memorandum and Articles of Association, share certificates, nominee agreement (s), and any other documents pertaining to the beneficial ownership of the company.

3. The said witnesses do apply to the Grand Court pursuant to Section 3A of the Confidential Relationships (Preservation) Law for directions as to the manner of giving evidence in the production and inspection of the said documents before Mr. Justice Schofield, in Chambers on 24th day of June, 1994 at 9.30 a.m.

4. The said examiner do record in writing the evidence of the said witnesses in examination, cross-examination and re-examination and to require the said witnesses to sign his deposition in the Examiner's presence and when so completed file it with the Clerk of the Grand Court to be forwarded to CITEL in Lima, Peru.

Worldwide Financial Holding ["Worldwide"] is the holder of the account referred to in the Order and on an inter partes application asked that the Ex Parte Order be set aside. The learned trial Judge refused to set aside the Order but deleted paragraph [2] [ii] of the Order.

At the hearing of the appeal, Mr. Quin on behalf of the appellant, argued four grounds of appeal:

1. The learned Judge erred in law in holding that CITEL does constitute a Court or Tribunal as defined in Section 1 of the Evidence (Proceedings in Other Jurisdictions) (Cayman Islands) Order 1978 and further, the learned Judge erred in law in holding that this Honourable Court does have jurisdiction to rant the Order it made on the 22nd June, 1994.

2. The learned Judge erred in law in holding that

application is made, and any such order may require a person specified therein to take such steps as the Court may consider appropriate for that purpose.

(2) Without prejudice to the generality of subsection (1) above but subject to the provisions of this section, an order under this section may, make provision -

(a) for the examination of witnesses, either orally or in writing;
(b) for the production of documents.

Section 5 (1) The provisions of sections 1 to 3 above shall have effect in relation to the obtaining of evidence for the purposes of criminal proceedings as they have effect in relation to the obtaining of evidence for the purposes of civil proceedings except that -

(a) paragraph (a) of section 1 above shall apply only to a Court or Tribunal exercising jurisdiction in a Country or Territory outside the Cayman Islands;

(b) paragraph (b) of that section shall apply only to proceedings which have been instituted.

<u>CITEL</u> <u>as</u> <u>a</u> <u>Tribunal</u>:

The first observation to be made is that the Investigative Commission is not appointed under Article 99 which provides for the Permanent Commission to charge before Congress, high officials including the President of the Republic.

The Investigative Commission is appointed under Article 97 which states in part that the resolutions of the said Commission do not bind the Jurisdictional bodies. Such Investigative Commissions are appointed to investigate important matters which are not handled by the Permanent Commission. They submit their reports to the plenary meeting of Congress. Their conclusions approved by the plenary meeting do not bind the Judiciary nor affect the ordinary course of judicial process. The result of the investigation is

Citel was conducting an inquiry for evidence for the purpose of a trial and further, the learned Judge erred in law in not holding that Citel was conducting an inquiry for pre-trial discovery and not for testimony to be used at trial.

3. The learned judge erred in law in holding that Criminal Proceedings have been instituted pursuant to the requirement of Section 5 (1) (b) of the Evidence (Proceedings in Other Jurisdiction) (Cayman Islands) Order 1978.

4. The learned Judge erred in law in holding that the request for the production of documents set out in paragraph 2 of the Order of the 22nd June, 1994 were described with sufficient particularity or specified with sufficient particularity and satisfied the test set out in section 2 (3) (b) of the 1978 Order.

In his submissions Mr. Quin argued that CITEL was an investigative Commission and therefore was neither a Tribunal nor a Court. It exercised no judicial function. It could make no binding decision. It merely prepares a report making recommendations. It was also submitted that no criminal proceedings had been instituted in Peru. Thirdly, that the Order for the production of documents was defective in that the documents were not described with sufficient particularity in order to satisfy the test set out in section 2 [3] [b] of the 1978 Order.

Mr. Alberga, Q.C. for the Respondent submitted that the Investigative Commission was a Tribunal and that criminal proceedings had been instituted. He argued that in Peru the appointment of the Commission was the first stage of criminal proceedings.

The jurisdiction to grant the request is given by the

Evidence Proceedings in other jurisdiction (Cayman Islands) Order 1978 which extends to the Cayman Islands, Sections 1 to 3 and 5 to 10 of, and Schedule 2, to the Evidence [Proceedings in Other Jurisdictions] Act, [1975].

The relevant provisions of the 1975 Act are as follows:

"S.1 Where an application is made to the Grand Court for an Order for evidence to be obtained in the Cayman Islands, and the Court is satisfied -

(a) that the application is made in pursuance of a request issued by or on behalf of a Court or tribunal (the requesting Court) exercising jurisdiction in a Country or Territory outside the Cayman Islands; and

(b) that the evidence to which the application relates is to be obtained for the purposes of civil proceedings which either have been instituted before the requesting Court or whose institution before that Court is contemplated

the Grand Court shall have the powers conferred on it by the following provisions or this Act.

Section 2 (1) Subject to the provisions of this section, the Grand Court shall have power, on any such application as is mentioned in section 1 above by Order to make such provision for obtaining evidence in the Cayman Islands as may appear to the Court to be appropriate for the purpose of giving effect to the request in pursuance of which the communicated to the office of the Attorney General for the relevant purposes. Presumably the Public Prosecutor could then institute criminal charges.

In his reasons for Judgment, the learned trial Judge at page 3, states:

> "CITEL is a special Committee empowered by Congress to examine the evidence against Mr. Garcia and certain other named individuals.
>
> Once the evidence is before it the Committee prepares a final report on whether or not the alleged charges should go further. This report goes before a plenary meeting of Congress, acting as a jury. The Committee's report is considered, but is not binding on Congress. If Congress passes a resolution to that effect the Public Prosecutor is obliged to prosecute the state officials concerned and neither the Public Prosecutor nor the Supreme Court may reduce or extend the terms of the accusation."

In his book - Administrative law [1988], Sixth Edition, Sir William Wade distinguished "Tribunals" from ordinary Inquiries. Thus at pages 900 - 901 he states:

> " In principle there is a clear contrast between the function of a statutory tribunal and that of a statutory inquiry of the kind discussed in the next chapter. The typical tribunal finds facts and decides the case by applying legal rules laid down by statute or regulation. The typical inquiry hears evidence and finds facts, but the person conducting it finally makes a recommendation to a minister as to how the minister should act on some question of policy, e.g. whether he should grant planning permission for some development scheme. The tribunal need look no further than the facts and the law, for the issue before it is self-contained. The inquiry is concerned with the local aspect of what will usually be a large issue involving public policy which cannot, when it comes to the final decision, be resolved merely by applying law. Tribunals are normally employed where cases can be decided according to rules and there is no reason for the minister to be responsible for the decision. Inquiries are employed where the decision will turn upon what the minister thinks is in the public interest, but where the minister, before he decides, needs to be fully

In _Rio Tinto Zinc Corporation and others v Westinghouse Electric Corporation_ [1978] 1 ALL ER 434 it was held that evidence sought for an American Grand Jury's investigation could not form the subject of an Order because proceedings had not been instituted. The learned trial Judge endeavoured to distinguish that case from the instant one on the ground that the Grand Jury proceedings are closed proceedings, the defence having no right to be heard and they are optional at the behest of the prosecutor.

The Grand Jury is an investigative body and can in fact lay an indictment against an accused person. In the case of CITEL, it can investigate and make recommendations to Congress. The distinguishing factor found by the learned trial Judge cannot, in our view, transform the proceedings by CITEL into criminal proceedings.

There is absolutely no evidence that the Public Prosecutor has instituted criminal proceedings against Mr. Alan Garcia and until this has been achieved, the Grand Court of the Cayman Islands has no jurisdiction to entertain the request from CITEL. It is clear that in the Cayman Islands, in such circumstances, criminal proceedings could not be said to have been instituted. The learned trial Judge was in error in holding that criminal proceedings had been instituted.

For these reasons, the appeal was allowed and the Order of the trial Judge vacated. It was ordered that the costs of the appeal and the costs before the trial judge should be the appellant's to be agreed or taxed.

> informed and to give fair consideration to objections. In other words, tribunals make judicial decisions, but inquiries are preliminary to administrative or political decisions, often described as quasi-judicial decisions."

CITEL merely investigates and makes a recommendation to Congress. The duties of this Investigative Commission were to investigate the contract of the Electric Train of Lima. The findings of the Investigative Commission does not and cannot itself result in the prosecution of any person. It is not binding on the Public Prosecutor. He is not obliged to prosecute.

Article 35 of the Regulations provides that the conclusions approved by the Plenary meeting does not bind the Judiciary or affect the ordinary course of the judicial process.

The finding of the learned Judge cannot therefore be supported because in the passage quoted above, he erred in attributing to CITEL the powers and procedures of the Permanent Commission appointed under Article 99.

CITEL cannot make any binding decisions. It is in reality a Commission mandated to make enquiries which are preliminary to administrative or Judicial decision. [WADE supra].

In our view, the Investigative Commission cannot be regarded as a tribunal to bring it within s. 1 [a] of the 1975 Act. The Grand Court of the Cayman Islands cannot, in these circumstances, entertain an application from such an Investigative Commission.

This finding that CITEL is not a Court or Tribunal would be sufficient to dispose of the appeal. However, in deference to the argument of Counsel and its general public importance, we consider the alternative question whether or not criminal proceedings have been instituted.

The learned trial Judge found that the appointment of CITEL was an essential first step in the institution of criminal proceedings against Mr. Alan Garcia. He also held that the proceedings of CITEL was the first stage in the criminal process.

In a memorandum from the Public Prosecutor's Office in Peru to the Commissioner of Police in the Cayman Islands, the Public Prosecutor states that the Public Prosecutor's Office in Peru is responsible for the institution of criminal proceedings.

It may be that CITEL is the first stage in the investigation as to whether criminal proceedings will be instituted. However, it is the Public Prosecutor who institutes criminal proceedings. It cannot therefore be said that criminal proceedings have been instituted on the appointment of CITEL.

The evidence discloses that on the Permanent Commission's recommendation, the congress can, by resolution, determine that criminal proceedings be instituted. However, it remains with the Public Prosecutor to institute the criminal proceedings. It is true that he has no discretion as to whether these proceedings should be instituted.

Secondly, CITEL, as an Investigative Commissions, must report to Congress and the conclusions approved by the Plenary meeting is communicated to the Office of the Attorney General. It is then left to the Public Prosecutor to institute criminal proceedings. Under Article 35 there is no binding resolution on which the Public Prosecutor must act.

Thirdly, ordinary criminal actions are instituted by the Public Prosecutor.

It, therefore, appears that all criminal actions are instituted by the Public Prosecutors whether it be in relation to a high official or the ordinary citizen.